S VIGNESWARAN M SANASEE A

v.

MAJU INSTITUTE OF EDUCATIONAL DEVELOPMENT (MIED) B

HIGH COURT MALAYA, KUALA LUMPUR
MAH WENG KWAI JC
[ORIGINATING SUMMONS NO: D-24NCC-8-2010]
10 MAY 2010 C

CIVIL PROCEDURE: *Affidavits - Admissibility - Striking out or expunging affidavits and contents contained therein - Whether certain parts of affidavit to be expunged - Whether contents of affidavit scandalous, irrelevant or otherwise oppressive - Defendant replying to affidavits without reserving right to object to hearsay, subjudicial and prejudicial evidence - Whether Defendant waived right to expunge - Whether non-compliance of affidavit with rules of court a mere technicality - Rules of the High Court 1980, O. 41 r. 6* D

CIVIL PROCEDURE: *Affidavits - Affidavit-in-support affirmed before filing of originating motion - Whether admissible - Rules of the High Court 1980, O. 41 r. 1* E

CIVIL PROCEDURE: *Affidavit - Contents - Whether contents of affidavit hearsay - Whether averments within deponent's own knowledge - Whether affidavits may contain hearsay evidence - Evidence Act 1950 s. 2* F

EVIDENCE: *Affidavit - Admissibility - Whether matters deposed to are scandalous, irrelevant or oppressive - Whether affidavit ought to be expunged - Rules of High Court 1980, O. 41 r. 6* G

EVIDENCE: *Affidavit - Contents of affidavit - Whether averments within deponent's own knowledge - Whether sources of information indicated - Rules of High Court 1980, O. 41 r. 5*

The plaintiff by his Originating Summons ("OS") sought leave of court to commence a writ action on behalf of the defendant against Dato' Seri S. Samy Vellu and 8 others under the Companies Act 1965. In support of his OS the plaintiff filed an affidavit in support (encl 2). The defendant then applied under O. 41 r. 6 of the Rules of the High Court 1980 ("RHC") for an order to expunge certain paragraphs appearing in encl. 2 (the said paragraphs). The H I

defendant sought to expunge the said paragraphs on the ground that they were in breach of O. 41 r. 5(1) RHC and therefore inadmissible. The defendant did not file a separate affidavit in support of its application but relied on another affidavit affirmed by Dato' Seri Samy Vellu (encl. 6). Counsel for the defendant also raised a preliminary objection against the competency of the OS on the grounds that encl. 2 was affirmed one day before the filing of the OS.

Held (dismissing the preliminary objection and dismissing the Defendant's application):

(1) Encl. 2 was properly filed. There is nothing in O. 41 RHC which requires an affidavit to be filed after the application which sets out the cause or matter has been filed. There is absolutely no prejudice caused to a defendant who is served with an application together with an affidavit in support which is affirmed earlier. In any event, O. 1A and O. 2 r. 1(1) RHC can be invoked with regard the non-compliance as an irregularity which shall not nullify the proceedings before the court; *Arab Malaysian Finance Bhd v. Serajudin Mohd Ismail and Anor*. (para 7)

(2) Although the defendant had in its summons in chambers invoked O. 41 r. 6 RHC to expunge the said paragraphs on grounds that they are "scandalous, irrelevant or otherwise oppressive", the defendant had not in its affidavit in support spelt out the matters in encl. 2 which were allegedly scandalous, irrelevant or otherwise oppressive and the manner in which they were so. Furthermore, the said paragraphs were not "scandalous, irrelevant or otherwise oppressive" statements to be struck out pursuant to O. 41 r. 6 RHC. (para 9)

(3) The plaintiff by his OS applied for leave to commence derivative action. An application for leave is an interlocutory proceeding in nature. The averments in the said paragraphs were based on facts within the plaintiff's knowledge and documents that he had access to, namely the affidavit of one Citrakala a/p Palanisamy which was annexed as exhibits to encl. 2. (para 12)

(4) Section 2 of the Evidence Act 1950 provides that the Evidence Act shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court. Accordingly the hearsay rule does not apply to affidavit evidence. (para 12)

(5) Further, the matters stated by the plaintiff in his OS were not subjudice as the KL High Court Civil Suit No. D22-1189-2009 was filed by the defendant and another company against Citrakala a/p Palanisamy and 8 others where the parties, the cause of action and reliefs sought were different. There was nothing to suggest that the plaintiff in his application sought to influence in any way the outcome of suit D22-1189-2009. (para 12)

(6) The defendant had replied the several affidavits of the plaintiff without reservation of its' purported right to object on the grounds of hearsay, subjudice and prejudice, the defendant had waived its right to expunge the said paragraphs. (para 12)

(7) In any event, the defendant's application to expunge the said paragraphs for the alleged non-compliance with rules of court could be said to be basically a technical objection. Grave injustice would be occasioned to the plaintiff if the court were to expunge the said paragraphs merely on the ground of technicality. (para 12)

Case(s) referred to:

Abdul Halim Abdul Hanan & Ors v. Pengarah Penjara, Taiping & Ors [1996] 1 LNS 67 HC ***(refd)***

Arab Malaysian Finance Bhd v. Serajudin Mohd Ismail & Anor [1999] 6 CLJ 405 HC ***(refd)***

Atlas Housing Sdn Bhd v. Dream Property Sdn Bhd [2007] 8 MLJ 639 ***(refd)***

Bank Utama (Malaysia) Bhd v. Chai Koh Shon & Sons Sdn Bhd [2003] 1 CLJ 264 HC ***(refd)***

Chan Kwai Chun v. Lembaga Kelayakan [2002] 2 CLJ 288 HC ***(refd)***

Chin Mee Keong & Ors v. Pesuruhjaya Sukan [2007] 5 CLJ 363 CA ***(refd)***

Gilbert v. Endeem [1878] 9 Ch D 259 ***(refd)***

HongKong Bank Malaysia Berhad v. Sereedevei [1997] 2 CLJ (Supp) 517 HC ***(refd)***

Hong Kong Bank Malaysia Bhd v. Nor Harizan Mohd Ali [1999] 6 CLJ 466 HC ***(refd)***

Kantan Jaya Marine Services (PG) Sdn Bhd v. RHB Bank Bhd [2001] 2 CLJ 738 HC ***(refd)***

Kassim Sulong & Anor As The Liquidators Of 10 Companies v. Guthrie Estates Holdings Ltd & Ors [1994] 3 CLJ 186 HC ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645 FC ***(refd)***

Mui Bank Bhd v. Alkner Investments Pte Ltd [1990] 1 LNS 74 HC ***(refd)***

Public Bank Berhad v. Berjaya Housing Development Sdn Bhd & Ors [1995] 1 CLJ 237 HC ***(refd)***

A *Shell Company of the Federation of Malaya Ltd v. Chairman, Municipal Council (No 2) [1961] 1 LNS 123 HC* ***(refd)***
Standard Chartered Bank Malaysia Bhd v. Arivalagan Krishnan & Anor [2001] 4 CLJ 168 HC ***(refd)***
Tom Manas Enterprise Sdn Bhd v. Soh Ah Wah [1995] 3 CLJ 610 HC ***(refd)***
B *Tuan Sarip Hamid & Anor v. Patco Malaysia Berhad [1995] 3 CLJ 627 SC* ***(refd)***
Yang Lak Man v. Yang Paw Man [1999] 7 CLJ 131 HC ***(refd)***

Legislation referred to:
C Companies Act 1965, s. 181A, 181B, 181E
Evidence Act 1950, s. 2
Interpretation Acts 1948 and 1967, s. 3
Rules of the High Court 1980, O. 1A, O. 2 r. 1(1), O. 5 r. 4, O. 7, O. 28, O. 41 rr. 5(1), (2), 6, 9(2), 10(4), O. 92 r. 4

D *For the plaintiff - Vasanthi Arumugam; M/s Vas & Co*
For the defendant - Chetan Jethwani; M/s Kumar & Partnership

Reported by Amutha Suppayah

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JUDGMENT

Mah Weng Kwai JC:

[1] The plaintiff by his originating summons is seeking *inter alia*,
F leave of court to commence an action on behalf of the defendant by way of a writ of summons and statement of claim against Dato' Seri S Samy Vellu a/l Sangalimuthu and 8 Others under ss. 181A, 181B and 181E of the Companies Act 1965 and O. 5 r. 4, O. 7, O. 28 and O. 92 r. 4 of the Rules of the High Court 1980 (RHC).

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[2] In support of his originating summons, the plaintiff filed and served his affidavit in support (encl. 2) on the defendant on 12 January 2010.

[3] On 25 February 2010 the defendant filed its summons in
H chambers (encl. 12) under O. 41 r. 6 RHC and/or the inherent jurisdiction of the court for an order to expunge paras. 27, 28 to 28.20, 29 to 29.8, 30, 36 to 38 and 51 to 54 (the said paragraphs) appearing in the plaintiff's affidavit (encl. 2).

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[4] The defendant did not file a separate affidavit in support of its summons in chambers, but relied on matters stated in another affidavit affirmed by Dato' Seri Samy Vellu a/l Sangalimuthu on 24 February 2010 (encl. 6) which can be summarized as follows:

(a) The averments made in the said paragraphs to be expunged contravene the rule against hearsay and are contrary to O. 41 r. 5(1) RHC;

(b) The averments are subjudice as Kuala Lumpur High Court Civil Suit No. D22-1189-2009 is pending trial before another court;

(c) The averments are prejudicial to the defendant and do not add any probative value to the issues before the court.

[5] Before the hearing of the summons in chambers, counsel for the defendant raised a preliminary objection against the competency of the originating summons. Counsel contended that the originating summons ought to be struck out as the plaintiff's affidavit in support (encl. 2) of the originating summons was affirmed prior to the filing of the originating summons. Enclosure 2 was affirmed one day before the filing of the originating summons.

[6] Counsel for the defendant relied on the decision in the High Court case of *Arab Malaysian Finance Bhd v. Serajudin Mohd Ismail & Anor* [1999] 6 CLJ 405 which stated that if an affidavit is affirmed before the filing of an application, the affidavit cannot be said to have been affirmed in a cause or matter because at the time of filing the affidavit, the cause or matter did not yet exist. In that case the affidavit was excluded by the court as it was affirmed a week before the filing of the originating summons which it purported to support.

[7] In his written submission, counsel for the defendant submitted that if the preliminary objection is upheld and encl. 2 is excluded the originating summons stands unsupported and must be dismissed *in limine*. Counsel then proposed that to remedy the situation, the plaintiff should file a further affidavit to adopt and verify the contents of his affidavit (encl. 2). The reason for the proposal by counsel was so that the plaintiff cannot escape liability in the event action is taken against him on matters stated in his

affidavit, for example contempt of court, on the ground that his affidavit was not properly filed or regularly before the court as at the time of filing the affidavit, the originating summons was not yet in existence.

I dismissed the defendant's preliminary objection and held that the affidavit (encl. 2) was properly filed before the court for the following reasons:

(a) I wholly disagree with the contention of counsel for the defendant and his reliance on the rationale in the decision in *Arab Malaysian Finance Bhd (supra)*.

(b) There is nothing in O. 41 RHC which requires an affidavit to be filed after an application which sets out the cause or matter has been filed.

(c) O. 41 r. 9(2) RHC merely states that every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not indorsed may not be filed or used without the leave of the court. The rule does not prohibit the swearing of an affidavit before an application is filed.

(d) In most cases, for practical reasons (and almost without exception), affidavits are invariably affirmed before an application is filed. In reality affidavits are usually affirmed a day or just before an application with the affidavit in support are filed in court.

(e) The procedure in *Arab Malaysian Finance Bhd (supra)* is honoured more in its non-compliance. To comply with the decision, a party intending to file an application with an affidavit in support would have to go to court, file the application, await a case number to be given to the application by the court clerk at the registration counter, then have the affidavit in support affirmed by the deponent in the presence of a commissioner for oaths before returning to the registration counter to file the affidavit that has just been affirmed. This unnecessary procedure will cause untold inconvenience to litigants for no real or perceived benefit. Invariably what is required in *Arab Malaysian Finance Bhd (supra)* is never followed.

(f) There is absolutely no prejudice caused to a defendant who is served with an application together with an affidavit in support which was affirmed earlier, whether by a day or a week, before the application was filed. I do not see how such a situation can be disadvantageous to the defendant.

(g) Even assuming the court is wrong in not agreeing with *Arab Malaysian Finance Bhd (supra)*, the court can without hesitation rely on O. 2 r. 1(1) RHC to regard the non-compliance as an irregularity which shall not nullify the proceedings before the court.

(h) The court can also rely on O. 1A RHC and shall have regard to the justice of the case and not only to the technical non-compliance of the rules.

(i) Importantly, counsel for the defendant has chosen to ignore a host of decisions delivered after *Arab Malaysian Finance Bhd (supra)* wherein the learned judges have for good reasons, disagreed with the decision of RK Nathan J in A*rab Malaysian Finance Bhd*. I need only refer to the cases of:

(i) *Hong Kong Bank Malaysia Bhd v. Nor Harizan Mohd Ali* [1999] 6 CLJ 466 per Azhar bin Hj Ma'ah J (now JCA);

(ii) *Yang Lak Man v. Yang Paw Man* [1999] 7 CLJ 131 per Mohd Hishamuddin bin Mohd Yunus J (now JCA);

(iii) *Standard Chartered Bank Malaysia Bhd v. Arivalagan Krishnan & Anor* [2001] 4 CLJ 168 per Low Hop Bing J (now JCA) and

(iv) *Bank Utama (Malaysia) Bhd v. Chai Koh Shon & Sons Sdn Bhd* [2003] 1 CLJ 264 per Sulaiman Daud J (now JCA).

In all the above cases, it was held that the RHC do not expressly or by implication require that an affidavit in support should only be affirmed after the filing of the originating cause or matter. Low Hop Bing J (now JCA) went on to say that in view of the filing and extraction procedure practiced in the court registry, it will be inconvenient and impractical for the affidavit to be affirmed on or after the date of the filing of the originating summons.

A It is unfortunate that counsel for the defendant saw it fit to raise the preliminary objection which, in light of the above cited cases, rendered it frivolous and without merit.

j) The affirmation by the plaintiff in encl. 2 before the filing of
B the originating summons is not detrimental to the defendant in any way and has not occasioned any miscarriage of justice.

[8] On the application proper, counsel for the defendant sought to expunge the said paragraphs on the ground that they are in
C breach of O. 41 r. 5(1) RHC and therefore inadmissible. Counsel contended that where an affidavit is filed for the purpose of obtaining final relief, O. 41 r. 5(1) RHC specifies that an affidavit may contain only such as the deponent is able of his own knowledge to prove facts, that is, it excludes hearsay evidence. The
D only exception when an affidavit may contain hearsay evidence is where an affidavit is affirmed for the purpose of being used in interlocutory proceedings pursuant to O. 41 r. 5(2) RHC. Counsel further contended that the relief sought by the plaintiff in his originating summons is a final relief and not an interlocutory
E proceeding in nature.

Counsel for the defendant referred to the following High Court cases namely:

i) *Chan Kwai Chun v. Lembaga Kelayakan* [2002] 2 CLJ 288 per
F Arifin Zakaria J (as he then was).

ii) *Mui Bank Bhd v. Alkner Investments Pte Ltd* [1990] 1 LNS 74 per Chao Hick Tin JC (as he then was).

iii) *Kassim Sulong & Anor As The Liquidators Of 10 Companies v. Guthrie*
G *Estates Holdings Ltd & Ors* [1994] 3 CLJ 186 per Zakaria Yatim J.

in support of his contention that the said paragraphs ought to be expunged.

[9] It is pertinent to note at this stage that although the
H defendant had in its summons in chambers invoked O. 41 r. 6 RHC to expunge the said paragraphs on the ground that they are "scandalous, irrelevant or otherwise oppressive", the defendant has not in its affidavit in support spelt out the matters in encl. 2 which are allegedly scandalous, irrelevant or otherwise oppressive and the
I manner in which they are so. Instead, the defendant relies on the

rule against hearsay to expunge the said paragraphs on the ground that encl. 2 is an affidavit affirmed and used in a proceeding which is not interlocutory in nature.

[10] On the facts, the defendant sought to expunge the said paragraphs on the ground that the plaintiff had stated in encl. 2 that the contents were obtained from the averments of one Citrakala a/p Palanisamy in an affidavit affirmed by her in Kuala Lumpur High Court Civil Suit No. D22-1189-2009. In that case the defendant and MIED Capital Sdn Bhd had commenced action against Citrakala a/p Palanisamy and 8 others for breach of duties thereby causing financial loss to the defendant.

[11] As such, counsel for the defendant contended that the contents of the said paragraphs in encl. 2 are therefore not within the personal knowledge of the plaintiff and consequently must be expunged by reason of hearsay.

[12] Upon hearing the submissions of both counsels and reading the respective submissions, I dismissed the defendant's application on the following grounds:

(a) The said paragraphs are extracted from the affidavit of Citrakala a/p Palanisamy dated 30 July 2009 which set out the facts in support of her complaints against Dato' Seri Samy Vellu a/l Sangalimuthu and which facts are adopted and relied upon by the plaintiff against the defendant herein. These facts have to be proven by the plaintiff in his case against the defendant after leave, if any, is granted to the plaintiff. Reading the said paragraphs, I do not find them to be "scandalous, irrelevant or otherwise oppressive" statements to be struck out pursuant to O. 41 r. 6 RHC. In any event as mentioned earlier nowhere in the supporting affidavit to their application did the defendant state which matters in encl. 2 were specifically "scandalous, irrelevant or otherwise oppressive".

In the case of *Kantan Jaya Marine Services (PG) Sdn Bhd v. RHB Bank Bhd* [2001] 2 CLJ 738 Low Hop Bing J (now JCA) held "for the purpose of establishing the ambit of the word "scandalous" under O. 41 r. 6 RHC the meaning of the word "scandalous" in O. 18 r. 19(1)(b) RHC would apply. It is taken to mean wholly unnecessary and irrelevant and not just unpleasant allegations. In this case the said paragraphs sought to be expunged are not wholly unnecessary and irrelevant. The

plaintiff has chosen to rely on them to establish the truth of his allegations, rightly or wrongly, against the defendant and are material to the reliefs prayed for.

(b) The plaintiff by his originating summons applies for leave *inter alia*, under s. 181A of the Companies Act 1965 to commence his derivative action against the company. The plaintiff seeks to enforce not his personal right, as a member of a company, but a right of the company. In the following cases the court has held that an application for leave is an interlocutory proceeding in nature, where at the leave stage, the court does not go into depth of the application. A decision by a court in an application for leave cannot be taken as a decision of that court on merits and thereby it has no binding effect.

See the cases of:

i. *Tuan Sarip Hamid & Anor v. Patco Malaysia Berhad* [1995] 3 CLJ 627 (Supreme Court).

ii. *Chin Mee Keong & Ors v. Pesuruhjaya Sukan* [2007] 5 CLJ 363 (Court of Appeal).

iii. *HongKong Bank Malaysia Berhad v. Sereedevei* [1997] 2 CLJ (Supp) 517 (High Court).

In the case of *Salaman v. Warner and Others* [1891] 1 QB 734 Lord Esher on the point of determining the final rights of the relevant parties said:

> If their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on then I think it is not final, but interlocutory.

Similarly Thomson CJ in *Shell Company of the Federation of Malaya Ltd v. Chairman, Municipal Council (No 2)* [1961] 1 LNS 123 remarked:

> Lord Alverstone said in the case of *Bozson v. Altrincham Urban District Council*:
>
> > The real test for determining this question ought to be this; Does the judgment or order, as made, finally dispose of the rights of the parties?

I would emphasize the words "finally dispose of the rights of the parties" A

> Whichever test be applied in our view our decision which is in question here is not a final decision.

(c) I hold the view that notwithstanding the plaintiff's application for leave is by way of an originating summons, which according to Kang Hwee Gee J (now JCA) in *Abdul Halim Abdul Hanan & Ors v. Pengarah Penjara, Taiping & Ors* [1996] 1 LNS 67 is clearly not an interlocutory proceeding, the nature of the relief sought by the plaintiff in his originating summons cannot be ignored and be said to be 'final' without further consideration. The leave sought by the plaintiff is merely to enable him to commence proceedings under *inter alia*, s. 181A of the Companies Act and is not an end by itself. And in the words of Cotton LJ in *Gilbert v. Endeem* [1878] 9 Ch D 259 it was held that: B C D

> ... those applications only are considered interlocutory which do not decide the rights of the parties.

A grant of leave by the court is only a step towards the determination of the rights of the parties. E

(d) The averments in the said paragraphs are based on facts within the plaintiff's knowledge and documents that he has access to, namely Citrakala a/p Palanisamy's affidavit affirmed on 30 July 2009 and the statutory declaration sworn on 8 December 2009 which are public documents available to him. Citrakala a/p Palanisamy's affidavit and statutory declaration are annexed as exhs. VS15 and V26 respectively to the plaintiff's affidavit (encl. 2). (Section 3 of the Interpretation Acts 1948 and 1967 defines an affidavit to include a statutory declaration. See the case of *Atlas Housing Sdn Bhd v. Dream Property Sdn Bhd* [2007] 8 MLJ 639). The plaintiff has deposed that the said paragraphs in encl. 2 are based on what he had read. Further Citrakala a/p Palanisamy's affidavit itself is admissible pursuant to O. 41 r. 10(4) RHC which provides that where an affidavit has been filed, an office copy thereof may be used in any proceedings. F G H

(e) Section 2 of the Evidence Act 1950 provides that the Evidence Act shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court. Accordingly the I

hearsay rule does not apply to affidavit evidence. In the case of *Tom Manas Enterprise Sdn Bhd v. Soh Ah Wah* [1995] 3 CLJ 610 Low Hop Bing J (now JCA) held that the provisions of the Evidence Act 1950 particularly the rule against hearsay do not apply to affidavit evidence and further stated that 'in my judgment, any person having knowledge of the matter may affirm an affidavit which is a written statement of evidence, sworn by the person making it'.

(f) Further, I am of the view that the matters stated by the plaintiff in his originating summons are not subjudice as the KL High Court Civil Suit No. D22-1189-2009 was filed by the defendant and another company against Citrakala a/p Palanisamy and 8 others where the parties, the cause of action and reliefs sought are different.The plaintiff in this case seeks leave to commence an action against the defendant for remedies arising from misappropriation and negligence against Citrakala a/p Palanisamy and the trustees of the defendant. There is nothing to suggest that the plaintiff in his application has sought to influence in any way the outcome of the Kuala Lumpur High Court Civil Suit No. D22-1189-2009.

(g) Counsel for the plaintiff contended that as the defendant had replied the plaintiff's affidavits, the defendant's application to expunge the said paragraphs is an afterthought. I am of the view that as the defendant had in fact replied the several affidavits of the plaintiff without reservation of its' purported right to object on the grounds of hearsay, subjudice and prejudice, the defendant had waived its right to expunge the said paragraphs. Further, the plaintiff had in turn replied to the defendant's affidavits. In the case of *Public Bank Berhad v. Berjaya Housing Development Sdn Bhd & Ors* [1995] 1 CLJ 237 Mohd Hishamudin bin Mohd Yunus J (now JCA) held "where the defendants have filed two affidavits and (neither) of the affidavits contained the grounds of the preliminary objection raised by the defendants as to the hearsay contents in the plaintiff's affidavit, the court held the defendants by their conduct, had waived their right to object to the defects in the plaintiff's affidavit."

(h) In the event it is shown that the court was wrong to rely on s. 2 of the Evidence Act 1950 to exclude the applicability of the rule against hearsay evidence to encl. 2 and to further hold that the application of the plaintiff herein is an interlocutory proceeding and is thus not bound by the provisions of O. 41 r. 5(1) RHC, the defendant's application to expunge the said paragraphs for the alleged non-compliance with rules of court, can be said to be basically a technical objection. In the Federal Court case of *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Berhad* [2002] 1 CLJ 645, Mohtar Abdullah FCJ, held that the duty of the court to ensure justice is done far outweighs any procedural technicality preventing it from being done. Similarly in this case grave injustice would be occasioned to the plaintiff, if the court were to expunge the said paragraphs merely on the ground of technicality.

[13] For the reasons above stated I accordingly dismissed the defendant's encl. 12 with costs in the cause.